No. 49635-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TYLER J. MCVEY
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge
Cause No. 15-1-00783-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did the State present sufficient evidence of the crime of Rape of a Child in the First Degree and the crime of Child Molestation in the First Degree at trial.

B. STATEMENT OF THE CASE.

On August 29, 2016, the State filed a First Amended Information alleging one count of Rape of a Child in the First Degree occurring on or between March 1, 2015 and April 7, 2015, and one count of Child Molestation in the First Degree occurring on or between March 1, 2015 and April 7, 2015. CP 42. On September 1, 2016, the jury found the appellant, McVey, guilty of both charges. CP 126-127.

Kecia Johnson and Jason Seevers are the parents of E.S., who was born on October 21, 2010. RP 39:13-40: 18. Ms. Johnson and Mr. Seevers separated when E.S. was approximately two years old. RP 41: 3-10. Ms. Johnson began a relationship with Tyler McVey in 2014. RP 42:2-15; 43: 2-6. Mr. McVey would stay at Ms. Johnson's residence often and would be at her house when she was not there. RP 43: 14-24. Ms. Johnson would usually leave for work about 6:30 or 6:45 and Mr. McVey would watch E.S. RP 48: 3-11. This arrangement occurred three or four times. RP 48: 12-13.

Mr. Seevers indicated that he picked up E.S. when Mr. McVey was there and not Ms. Johnson on April 7, 2015, March 11, 2015, March 14, 2015 and March 24, 2015. RP 97: 6-25; 99: 21-25; 100:1-2. On April 7, 2015, Mr. Seevers picked up E.S. and Mr. McVey came to the door and said "Here you go, here is your daughter." RP 101-102. Mr. Seevers noticed that E.S. wouldn't say anything, which was very unusual. RP 102: 9-11. E.S. was also skittish and acting funny, in a manner that Mr. Seevers had not seen her act before. RP 102: 22-24. Mr. Seevers asked E.S. what was wrong and E.S. stated, "Tyler touches me, and I don't like it." RP 103: 6-10. When Mr. Seevers asked E.S. where did he touch you, E.S. clammed up and was quiet. RP 103:25-104:2.

Mr. Seevers called Ms. Johnson and E.S. told Ms. Johnson what she had said to Mr. Seevers. RP 104: 15-20. When he got home, Mr. Seevers and his wife gave E.S. a doll and asked her where Tyler had touched her and she pointed to the doll's vaginal area. RP 106:17- 108:7. The next day, Mr. Seevers made an appointment at Oakland Bay Pediatrics and was referred to the sexual assault clinic. RP 109:21-22, 111:2-6.

Detective Alfred Stanford testified regarding his role in the investigation of the case. Detective Stanford contacted Monarch

Children's Justice and Advocacy Center to set up a forensic interview for E.S. RP 140:16-19. During his investigation, Detective Stanford determined that Mr. McVey's date of birth was October 7, 1989. RP 143: 18-23.

Sue Villa, also known as Sue Batson, a child forensic interviewer at Monarch Children's Justice and Advocacy Center in Lacey, WA, interviewed E.S. on April 30, 2015, at the Monarch Children's Justice and Advocacy Center. RP 163:25-164:1; 164:6; 165: 6-7; 172: 12-21. Ms. Villa described E.S. as kind of a spunky little girl with a bit of an opinion of her own and giving an unusually clear statement. RP 174:14-19. E.S. communicated very effectively and was very articulate. RP 175:14-17. When asked "Why are you here to talk to me?" E.S. stated that she was there to talk about Tyler. RP 176: 13-14. E.S. stated that he had touched her with his hands and she didn't like it. She specifically identified him as touching the area of her body that she used to go potty and said he "screwed" it and it hurt. RP 177: 1-14. E.S. clarified that his hand went inside her body and that stated that Tyler was her mom's boyfriend. RP 177:16-19. E.S. told Ms. Villa that it happened more than one time in the dining room. RP 177: 20 – 178:8.

E.S. described specific details to Ms. Villa about an incident where his hand went inside her body where E.S. used the term screwed. RP 178:12-24. E.S. indicated that the touch was inside her underpants. RP 181:17-18.

Dr. Joyce Gilbert, a Pediatrician at Providence St. Peter's Sexual Assault Clinic and Child Maltreatment Center, conducted an examination of E.S. on April 10, 2015. RP 198:13-25; 230: 6-7. Dr. Gilbert indicated that E.S. had great communication skills for a four-year-old. RP 223: 4-5. Dr. Gilbert conducted a medical interview with E.S. RP. 225. When asked why she was at the doctor's office, E.S. stated it was because Tyler pinched her and she immediately pulled down her leggings and showed Dr. Gilbert her upper thigh and pinched it in three different areas. Dr. Gilbert asked her if Tyler pinched her anywhere else and E.S. would look down, say no, or just be quiet. RP 226: 2-17. Dr. Gilbert stated that E.S. brought up the name Tyler when asked why she was at the doctor's office by stating because Tyler pinched me and saying that in was inappropriate. RP 227: 1-8. When E.S. demonstrated the pinching she pinched her anterior thigh close to the groin but not in the genital area three times and twisted and said, "This is what Tyler did." RP 227: 15-21. Dr. Gilbert asked E.S. if it hurt

when Tyler pinched her and she said yes. E.S. described that he pinched her in the dining room when mommy was at work. E.S. also stated that Tyler was mommy's boyfriend. RP 228: 4-19.

Dr. Gilbert then conducted an examination using a colposcope. As soon as a blanket was pulled back and E.S. visualized her genital area, as Dr. Gilbert was using the colposcope, E.S grabbed her clitoral hood, pulled it out and twisted it and said, "This is what Tyler does." RP 237: 5-18. During the next part of the exam, the nurse was assisting with the labia traction where she gently has her hands on the labia, one hand on each one, and she just separates them, and that way the inner opening area can be visualized. When the nurse did this, E.S. put her hands inside the nurse's hands, pushed the nurse's hands away and said, "I can do this." Dr. Gilbert asked how she knew how to do that and she said, "This is what Tyler taught me to do when he puts in fingers in here" and she pointed with her fingers right into the vaginal opening. RP 238: 9-24. E.S.'s examination was normal which Dr. Gilbert testified was not surprising medically because 95 percent of the children who describe or disclose penetrating injury have a normal exam. RP 241:3- 242:6.

E.S. testified that she told her dad that Tyler touched her private and identified Mr. McVey as Tyler in the courtroom. RP 124:23- 125:13. E.S. described her privates as being below the waist and stated that it happened once in the dining room of her mom's old house while her mom was at work. RP 126 3-18.

C. ARGUMENT.

1. The State produced sufficient evidence such that any reasonable juror could find that the both the crimes of Rape of a Child in the First Degree and Child Molestation in the First Degree occurred.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

> "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (Cite omitted.) This inquiry does not require a reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt. "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

> reasonable doubt. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d. at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

In this case, the State was required to prove that on or between March 1, 2015 and April 7, 2015, in the State of

Washington, Tyler McVey did have sexual intercourse with E.S. who was less than 12 years old, not married to the defendant and that the defendant was at least 24 months older than E.S. CP 42; RCW 9A.44.073. All of the elements of that offense were presented to the jury at trial. E.S. testified that the touching occurred at her mom's old house while her mommy was at work. RP 126. Ms. Johnson testified that the Mr. McVey watched E.S. when she went to work at her home. She testified that the home was in Lacey. RP 43: 6-11; 48:11. Officer Heather Stetler testified that she went to Ms. Johnson's residence in Lacey and that it is in Thurston County, Washington. RP 159:11-13.

Both Mr. Seevers and Ms. Johnson testified that E.S. has never been married, and Ms. Johnson testified specifically that E.S. has never been married to Mr. McVey. RP 77:4-12; 94:13-16. E.S. was born on October 21, 2010 and Mr. McVey was born on October 7, 1989. RP 39; 143:22-23. Simple math shows that E.S. was four years old at the time of the offenses and Mr. McVey was far more than 24 months older than E.S.

Sexual intercourse has its ordinary meaning and occurs upon any penetration, however slight, and also means any penetration of the vagina or anus, however slight, by an object.

RCW 9A.44.010(1). E.S. told Mr. Seever that "Tyler touches me and I don't like it." RP 103. She also demonstrated where he had touched her on a doll and showed that the touching was in the vaginal area. RP 106:17-108:7. When E.S was interviewed by Sue Villa, she indicated that Tyler had touched her with his hands and she didn't like it. She specified that he touched the part of her body that she used to go pee and said he "screwed" it and it hurt. RP 177:1-14. She also stated that his hand went inside her body and that it happened more than one time in the dining room. RP 177-178. When examined by Dr. Gilbert, E.S. grabbed her clitoral hood and twisted it and said, "This is what Tyler does." RP 237: 5-18. When the nurse assisted with labia traction, E.S. stated "I can do this," and clarified saying, "this is what Tyler taught me to do when he puts his fingers in here" while pointing to her vaginal opening. RP 238: 9-24. Based on that evidence, viewed in a light most favorable to the State, any rational trier of fact could find that sexual intercourse occurred.

To prove the crime of Child Molestation in the First Degree Count II, the State was required to show that on or between March 1, 2015 and April 7, 2015, in the State of Washington, the defendant did engage in sexual contact with E.S. an was at least

thirty-six months older than E.S, who was less than 12 years old and not married to the accused. CP 42. As discussed above with regard to Count I, there was ample testimony that the acts occurred in the State of Washington, that Mr. McVey was not married to E.S. and there was an age difference far greater than thirty-six months.

Mr. Seevers testified that there were four occasions when he picked up E.S. when Mr. McVey was watching her and Ms. Johnson was not present and that those occurred on March 11, 2015, March 14, 2015, March 24, 2015, and April 7, 2015. RP 97:6-25; 99:21-25; 100: 1-2. Sue Villa testified that E.S. described acts of sexual contact on more than one occasion in the dining room. RP 177:20-178:8. Dr. Gilbert indicated that E.S. described pinching on her upper thigh in three different areas, close to her groin. RP 227-226. She further testified that he touched her in the dining room when mommy was at work. RP 228: 4-19. Later, while using Dr. Gilbert used the colposcope, E.S. grabbed her clitoral hood, pulled it out and twisted it and said, "This is what Tyler does." RP 237: 5-18. During the labia traction portion of the exam, E.S. said, "this is what Tyler taught me to do when he puts his fingers in here, while attempting to help the nurse and pointing to her vaginal opening. RP 238: 9-24.

Sexual contact is defined as any touching of the sexual or other intimate parts or a person done for the purpose of gratifying the sexual desire of either party. RCW 9A.44.010(2). Contact is intimate within the meaning of the statute if the conduct is of such a nature that a person of common intelligence could fairly be known to expect that, under the circumstances, the parts touched were intimate and therefore the touching was proper. A jury may determine that "parts of the body in close proximity to the primary erogenous areas" are intimate parts. State v. Harstad, 153 Wn.App 10, 21, 218 P.3d 624, (2009). In Harstad, the Court of Appeals found that touching the upper inner thigh can constitute sexual contact, stating, "We conclude that a person of common intelligence could be expected to know that [the victim's] upper inner thigh, which puts the defendant's hand in closer proximity to a primary erogenous zone than touching the hip does, was an intimate part." Id. at 22.

At trial in this case, testimony showed that E.S. had described more than one act of sexual contact. E.S. gave a specific example of penetration that resulted in Count I, but the evidence clearly showed additional acts such as the touching of the thighs, Sue Villa's testimony that acts occurred on more than one

occasion, and Dr. Gilbert's testimony that E.S. stated that "this is what Tyler does when he puts his finger in here," which is in plural tense describing more than one incident. The State did not make a specific election as to which incident it sought to prove for Count II, but the State is not required to. The jury was properly instructed using WPIC 4.25 that one particular act of Rape of a Child in the First Degree and one particular act of Child Molestation in the First Degree must be proved beyond a reasonable doubt. CP 144-145. The Court further properly instructed the jury that they must decide each count separately. CP 135. The jury considered the evidence presented and found that each offense had occurred.

When the evidence presented at trial is viewed in a light most favorable to the State, any rational juror could find that each of the essential elements of Rape of a Child in the First Degree, as charged in Count I, occurred and that each of the essential elements of Child Molestation in the First Degree, as charged in Count II, occurred.

Mr. McVey cites to State v. Alexander, 64 Wn.App. 147, 822 P.2d 1250 (1990), for the proposition that inconsistencies in the victim's testimony made it so that the jury could not possibly have found the elements of the charge beyond a reasonable doubt. That

case involved a 9-year-old victim and the Court ultimately held that the combination of vouching testimony, inadmissible hearsay, improper questioning by the prosecution, and improper closing remarks "prevented Alexander from obtaining a fair trial." Id. at 158. Here, Mr. McVey does not argue any of those factors. The appellant instead argues that E.S.'s testimony was inconsistent and there was no forensic medical evidence.

E.S. consistently indicated that she was sexually touched both inside and outside of her body. Pursuant to RCW 9A.44.120, Mr. Seevers, Dr. Gilbert and Sue Villa (Batson), were permitted to testify as to statements that E.S. made to them in regard to the sexual acts that occurred, by order of the Court entered after a Child Hearsay hearing had occurred on December 28, 2015. CP 16-20. Mr. McVey does not assign error to the trial Court's findings in regard to Child Hearsay. This case did not involve the plethora of issues that occurred in Alexander. Here, the jury was provided with admissible evidence and ultimately found Mr. McVey guilty beyond a reasonable doubt.

Mr. McVey's claim that the forensic medical evidence somehow negates the sufficiency of the other evidence is not consistent with the medical testimony provided at trial. Dr. Gilbert

testified that while E.S.'s examination was normal, that finding was not surprising medically because 95 percent of children who describe or disclose penetrating injury have a normal exam. RP 241:3-242:6. The jury considered the medical evidence along with other evidence admitted and rationally came to the conclusion that Mr. McVey was guilty of both charges.

D. CONCLUSION.

A jury's determination of guilt or innocence should not be disturbed where there is sufficient evidence to support the jury's verdict. In this case, there was sufficient evidence for the jury to consider. That evidence was sufficient for any rational trier of fact to find all of the essential elements of both Count I, Rape of a Child in the First Degree and Count II, Child Molestation in the First Degree. The reviewing court is not required to determine whether it would make the same decision, rather, after viewing the evidence in the light most favorable to the State, the reviewing court should find that there was sufficient evidence to support the jury's verdicts.

Respectfully submitted this 14 day of June, 2017.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 14th day of June, 2017, at Olympia, Washington.

Cynthia Wright

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